which would otherwise be open to the accused.

These two principles were further stressed by Their Lordships of the Privy Council in the recent case of *Noor Mohammed v. The King*[2].

On the appeal, Federal Counsel argued that this evidence was admissible as part of the *res gestae*. When he was asked to justify the admission of it in the face of the decision in *Makin's case*, he contended that the evidence was not adduced to show that the appellant was likely to commit murder and that therefore principle (a) was not involved. He has failed to satisfy us that this evidence did not have this effect or that it is admissible under paragraph (b). Accordingly we hold that it should not have been admitted.

We would mention that admission of evidence of this nature was previously commented on adversely by this Court in Federation Criminal Appeal 65/1949 — *Tan Geok Kwang v. P. P.*[3].

Mr. Edgar, Counsel for the appellant in this Court, applied for bail pending the re-trial. We grant the appellant bail in the sum of $4,000 with two sureties.

Re-trial Ordered.

PUBLIC PROSECUTOR v. THORBURN.

[App. Crim. Juris. (Laville J.) September 15, 1949]

[J.B. — Criminal Appeal No. 2 of 1949]

Emergency Regulations, 1948, Section 6(c) — Charge of behaving in a disorderly manner — Meaning of "disorderly manner".

This was an appeal by the Public Prosecutor against the acquittal of the respondent on a charge of behaving in a disorderly manner while carrying a firearm contrary to s. 6 (c) of the Emergency Regulations, 1948. The learned Magistrate found as a fact that the respondent did discharge his pistol into the air but acquitted him on the ground that his intention in so doing was not proved.

Held, that if the conduct of a person is such that in all the surrounding and attendant circumstances it would tend to cause physical harm to the person or property of anyone or to create in the mind of a person of normal courage and firmness of temper, dismay or apprehension, then such conduct is disorderly within the meaning of section 6 (c) of the Emergency Regulations 1948.

Case referred to:—

(1) *Pointon v. Hill* (1883) 12 Q.B.D. 306.

CRIMINAL APPEAL.

D. B. W. Good for the Appellant.

K. E. Hatchard for the Respondent.

Laville, J. : — This is an appeal by the Public Prosecutor against the acquittal of Mr. Thorburn by the Circuit Magistrate, Kluang, on a charge of behaving in a disorderly manner while carrying a firearm at the Ulu Remis Estate, Layang Layang, on 24th May, 1949, about 1.30 a.m., contrary to sec. 6(c), Emergency Regulations, 1948.

The case was heard at Kluang on 25-7-49 and concluded the same day. The prosecution evidence was that Mr. Thorburn arrived at the Estate guardroom with his wife in a car from Johore Bahru about 1.30 a.m. He is the Manager of Ulu Remis Estate. Owing to the fact that his way lay through a danger area (from bandits) and his wife was with him, he had instructed a guard to meet him at Kulai about 10 p.m. to escort him in to his bungalow. He was late at Kulai and the guard had returned to the estate. He was therefore compelled to risk the journey from the main road to his bungalow unescorted through an admittedly dangerous area. As a result, when he reached the guardroom on the estate, he was out of temper to a marked degree.

When he reached the guardroom he called out Cpl. No. 8751 and abused him and spat at him; at the time he had a .45 Colt automatic in his hand which he pointed at the Cpl. Cpl. Sitam bin Ujang, No. 8725, corroborates this story as an eye-witness, but cannot say if the spitting was accidental or otherwise.

From the guardroom Mr. Thorburn went in his car to his house and was rung up by Sgt. Smith in charge of the Special Constables. Mr. Thorburn's wife answered the phone and very shortly after Sgt. Smith heard 8 automatic-weapon shots; shortly after Mr. Thorburn rang him up and complained about not having been met and escorted back. After hearing the shots Sgt. Smith went to Mr. Thorburn's bungalow and as a result of his orders the Special Constable on duty there, No. 23635, picked up 8 empty cartridge cases of .45 ammunition near Mr. Thorburn's car; his evidence is they were still warm, and that he saw accused fire 8 rounds. Mohamed Noor bin Raju, Special Constable No. 23642, confirms this.

Prosecution evidence as to the reactions of the people who heard the shots fired was as follows: Sgt. Smith says "If I hear a shot go off I would naturally think that it was from a bandit"; Jantan bin Yusof, Special Constable No. 23635, then at the gate says "I was afraid of the explosions"; Special Constable No. 23642 a chain away from Mr. Thorburn's house says "I lay down when I saw the flashes"; Manap bin Jema'at, Special Constable Body Guard, 7 chains away was awakened by the shots; he dressed hurriedly came out and took cover.

Mr. Thorburn gave evidence in defence. He said he was apprehensive at having to drive to his bungalow from the main road with his wife in the car along a road in a bandit area at between midnight and 1 a.m. and was annoyed at not having been met and escorted as he expected. He denied pointing a weapon at any of the inhabitants of the guard house or spitting at them, but admits that in his indignant expostulation to the Corporal some spittle may have been ejected on him. On reaching the house he rang up Sgt. Smith and complained of the absence of an escort, then went back to the car to fetch his weapons. The .45 automatic was loaded with 7 rounds and, as he was carrying it in with the other weapons, it went off by accident and his involuntary muscular reaction set it off again. He admits that the other shots he fired deliberately into the air towards the north where there are no houses. He can give no reason as to why he did so.

Mrs. Thorburn says her husband was annoyed at the guardhouse and also in the bungalow after telephoning Sgt. Smith, but was never out of control. Accused's driver Kuppusamy denies that accused at the guardroom had a weapon in his hand at all.

The learned Magistrate was clearly at a loss as to the nature of disorderly conduct and the meaning of the word "disorderly" and says as much in his grounds of judgment. He accepts the evidence of Cpl. 8751 as to accused abusing him and spitting at him, but holds that accused had an arm in his hand then but did not consciously point it at the Corporal. He holds also that accused was then in a towering rage and that if he did abuse the Corporal it was excusable and that he, the accused, had his temper under admirable control.

I am of the opinion that the learned Magistrate was correct in giving accused the benefit of the doubt as to whether or not he carried his firearm out of the car at the guardhouse and pointed it at the Corporal. Accused himself denies this and so does his driver, and the view the Magistrate has taken is also one that exculpates the accused. I am of opinion, in spite of the Magistrate's acceptance of the spitting incident, that the accused's version is probably the truth, and I base my opinion on the fact that such a method of expressing indignation and disgusted rage is not one that would occur to a man of the accused's nationality and ingrained custom. As to the events, namely the firing of shots from his .45 automatic by the accused at his bungalow, the learned Magistrate has rightly found on the prosecution evidence supported by the accused's own evidence that several shots were fired by him. The number of shots is immaterial for the purposes of this case.

I am also of opinion that the learned Magistrate's view is correct that accused, with his temper again roused by his telephone conversation with Sgt. Smith and under the pressure of the accumulated strain that the night had put on him, was moved without realising at the time the significance of his action to empty his automatic in the air.

I am of opinion that accused's explanation of the accidental explosion of a round followed by another caused by nervous reaction should be accepted and that this final catastrophe added to the other episodes led the accused as an act of childish defiance to empty his firearm into the sky in the direction where he knew no harm could be done.

On the whole the finding of the Magistrate as to the acts of accused that night is correct. As to what legal interpretation he should put upon those acts the Magistrate was at a loss. He says that throughout the whole of the evidence he found that the intention (of the accused) was not proved. I can only assume that this means that the Magistrate was of opinion that the acts of the accused, i.e. the pointing of the gun (which he accepts) and the firing of the shots were either accidental or not intended by the accused; in other words that the prosecution had failed to prove that the accused intended to act in a disorderly manner while carrying arms. The difficulty of the Magistrate was increased by the fact that he had no standard by which to measure the disorderliness of any conduct.

It is however quite clear from the accused's own evidence that the last few shots he fired were fired with full knowledge of what he was doing and with the intention of firing them, and the question for the Magistrate to decide was whether this conduct by the accused amounted to acting in a disorderly manner. There can be no doubt about the accused carrying arms at the time.

A preliminary point was taken at the hearing of the appeal by Mr. Hatchard for the respondent that the provisions of sec. 306 of the Criminal Procedure Code had not been complied with in that the sanction in writing by the Public Prosecutor for an appeal against an acquittal had not been obtained, but there is no merit in this objection. The D. P. P. is entitled under the provisions of sec. 376 (iii) & (iv), Cr. Pro. Code, to exercise the powers of the Public Prosecutor under sec. 306, and that section requires the written sanction of the Public Prosecutor only when, as one

might expect, some other person than the P. P. or D. P. P. appeals against an acquittal.

The learned D. P. P. stated that the meaning of 'disorderly' in sec. 6 (c), Emergency Regulations, 1948, was one it was difficult to tie down by a definition and that none or little help could be obtained from the legal concept in English law of a disorderly person or house. He cited *Webster's* dictionary on the meaning of the word and submitted that the 3rd definition might be accepted as the meaning to be attached to the words in sec. 6 (c), E.R., 1948. This definition says: "not complying with the restraints of order and law; tumultuous; unruly; lawless; turbulent".

On this point Mr. Hatchard for the respondent preferred the 4th definition in *Webster*, namely "offensive to good morals and public decency; notoriously offensive", and submitted that the acts done by the accused were not covered by that definition, nor could it be said that they were against the restraints of order and law. To constitute disorderly conduct the conduct must affect either the property of other persons or other persons themselves. In this case the property of other persons was not affected as the shots were fired towards the jungle, nor were other persons affected as the accused was alone.

I am of opinion that Mr. Hatchard's contention approximates more closely to what was intended to be the offence aimed at by sec. 6 (c) than that of the learned D. P. P. It can scarcely be said that to explode a firearm on one's own property after taking due precautions not to harm anyone in doing so is 'not complying with the restraints of order and law' or is tumultuous, turbulent, or unruly behaviour. But at the same time Mr. Hatchard has not pressed his definition to its logical and proper conclusion. The true test in my opinion of what constitutes disorderly conduct for the purposes of these Regulations is the effect that conduct is likely to have on the physical or mental condition of such persons as may be affected by it. If the conduct is such that in all the surrounding and attendant circumstances it would tend to cause physical harm to the person or property of anyone or to create in the mind of a person, of normal courage and firmness of temper, dismay or apprehension, then such conduct is disorderly within the meaning of sec. 6 (c), E.R., 1948.

Applying that definition of disorderly to the conscious act of firing by Mr. Thorburn, there is clear evidence which I have already detailed of the effect it had on people within hearing. It cannot be said that Sgt. Smith and the Special Constables who heard the shots fired were men of sub-normal courage and it is in my view self-evident that the sound of shots in an area admittedly subject to bandit operations, the more so as it was late at night, would tend to create dismay and apprehension in the stoutest of hearts.

Assuming the correctness of my definition of the word 'disorderly', it follows that it is not necessary that there should be an intention to cause dismay and alarm in order to constitute the offence of acting in a disorderly manner as long as the acts which were done were done intentionally and were such as would tend to cause dismay or apprehension to a normal person in the circumstances. It is clear from the evidence that the last shots fired by Mr. Thorburn were fired deliberately though it is probable that he did not pause to think what their natural effect on others would be.

Accordingly the learned Magistrate on his finding of fact should have held that there was clearly proved intention to fire the last shots and that such an action was one likely in the circumstances to cause dismay and apprehension to persons within hearing and actually did so, and that for that reason Mr. Thorburn had committed the offence with which he was charged.

I therefore find in favour of ground (b) of the appellant's petition, which is actually the only ground put forward.

Besides the submission by the respondent on the meaning of the word 'disorderly', it was contended by Mr. Hatchard that there were technical flaws in the presentation of the appeal, in that the petition has not stated clearly whether the appeal is based on an error of law or an error of fact, and that, as no error of law is submitted and no question of the interpretation of the word 'disorderly' is raised by the appellant, the appeal must be based on an alleged error of fact. The D. P. P. must therefore show (sec. 321 Cr. Pro. Code) that the acquittal was against the weight of evidence; in other words that the prosecution evidence was to be believed and that of the accused disbelieved, but he relies on the accused's evidence. It was argued that an appeal Court should not upset a Magistrate's finding on fact unless it is grossly wrong and against the evidence and that in this case there were grounds on which the Magistrate could find that accused had not been disorderly within the meaning of the section.

As to whether certain acts which are covered by the words of a criminal section actually fall within the mischief of the section is a matter of fact for the Court to decide and if the Court decides they do not it is a finding of fact not to be lightly upset by an appeal Court.

Mr. Hatchard cited *Pointon v. Hill*[1] at p. 306 for a ruling that, though soliciting subscriptions for a hospital might amount to begging, yet it was not punishable under the Vagrancy Act and that as the Court could use its discretion in such cases to say whether the act though covered by the definition was not within the mischief of the law, so here the Magistrate had used his discretion to say that firing a pistol in the circumstances in which Mr. Thorburn fired did not come within the mischief described by the word 'disorderly' in sec. 6 (c) Emergency Regulations, 1948.

On consideration I do not think there is any weight in these arguments. It is clear from the grounds of appeal that the appeal was based on law. Was what the Magistrate held the accused had done 'acting in a disorderly manner' or not? It would have been better to state that the Magistrate was wrong in law in his finding, but the issue was clear and the respondent could not have been misled by the wording in any way. Nor can I attach any weight to the contention that to decide whether certain acts are disorderly conduct or not is a finding of fact. It is actually a finding of law; the fact found in such a case is that the acts were done; the law declared is that they were disorderly conduct. It is also completely settled law by many cases that it is the duty of a Court of Appeal to reverse a finding of fact if it is patently wrong and erroneous and there is no room for doubt about it. Clearly in this case the facts were never in doubt or even contested and all that I sitting in appeal must decide is whether the Magistrate applied the right law to those facts. It is clear he could not do so as admittedly he did not know what 'disorderly' implied. The case of *Pointon v. Hill* actually was decided on the fact that the Vagrancy Act was aimed at begging as a mode of life and not against a specific soliciting for alms for a specific purpose not again to be restored to. In the case under appeal the act done in a disorderly manner is not specified and it is for the Court to decide if it is disorderly or not.

On the whole case I hold that the Magistrate was wrong in finding that Mr. Thorburn did not act in a disorderly manner. The acts committed by him are admitted, the surroundings in which they were done are proved to be those in which men's minds would be easily affected by any abnormal action, and the acts were such as in themselves would tend to startle anyone who happened to be within earshot.

I allow the appeal and reverse the decision of the Magistrate and find Mr. Thorburn guilty of the offence charged against him.

I take into consideration that he was under severe strain at the time and had for a long time been living under such strain which was greater that night because his wife was with him in the car, and that he considered he had grounds for legitimate anger over the failure of his escort, and for the moment allowed his anger to overrule his good sense and led him into a childish display of temper. I have however to remember that other people, not least the guards on his estate, were in a state of nervous strain and likely to be very apprehensive of a sudden shot in the night, and that the responsibility lay on Mr. Thorburn as Manager and Officer in charge of the Special Constables to be able to stand up under his greater strain. I also remind myself that no actual harm was done or intended and that Mr. Thorburn even in his outburst of rage took care to fire upwards into an uninhabited area. There was no wanton indiscriminate shooting.

Taking all circumstances into consideration I consider that a fine would be adequate in this case and I sentence Mr. Thorburn to a fine of $200.00 or two months simple imprisonment.

Appeal Allowed.

PUBLIC PROSECUTOR v. HENG YOU NANG.

[App. Crim. Juris. (Spenser-Wilkinson J.)
November 19, 1949]

[Selangor — Criminal Appeal from Sessions Court
No. 39 of 1949]

Criminal Procedure Code Ss. 278 and 318 — Whether judgment in a criminal matter can be altered after it has been pronounced and signed — Meaning of export — Customs Enactment (Cap. 5 of 1936).

In this case the Public Prosecutor had appealed against the acquittal of the respondent on charges connected with the alleged importation of certain goods by the respondent. This appeal was dismissed. Subsequently the Deputy Public Prosecutor applied by Motion that the Court should hear further arguments and review its judgment.

Held, that once a judgment in a criminal matter has been pronounced and signed it cannot be altered and that the Court had therefore no power to vary its decision in this case.

Cases referred to:—

(1) *Public Prosecutor v. Lee Tuah Suah* (1948) M.L.J. 55.

(2) *In re Gibbons* 14 Cal. 42.

(3) *Goh Ah San and 2 others v. The King* (1938) M.L.J. 95.

MOTION.

H. Shepherd for the Applicant.

W. L. Wrigglesworth for the Respondent.